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IN THE

Supreme Court of the United States

October Term, 1963.

No. 261

ESTATE OF WINFRED S. HURST, Deceased:

HARRY J. ALKER, JR.,

Petitioner.

PETITION FOR ALLOWANCE OF WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA AND THE ORPHANS' COURT OF MONTGOMERY COUNTY, PENNSYLVANIA.

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To the Honorable the Chief Justice and Associate Justices of the United States Supreme Court:

The petitioner, Harry J. Alker, Jr., respectfully prays your Honorable Court for allowance of a Writ of Certiorari to review the judgment of the Supreme Court of Pennsylvania entered March 19, 1963, affirming "*per curiam*" the judgment of the Orphans' Court of Montgomery County, Pennsylvania, and in support thereof, submits the following data and argument:

OPINIONS BELOW.

The "per curiam" opinion of the learned Supreme Court of Pennsylvania, filed March 19, 1963, is not yet reported in — Pa. — (1963).

The opinion of the learned Orphans' Court of Montgomery County per Taxis, P. J. is not reported.

JURISDICTION.

(I) The judgment of the learned Supreme Court of Pennsylvania was entered March 19, 1963.

(II) There was no order for rehearing, but the time for filing Petition for Certiorari was extended by this Court to June 27, 1963. ~~to~~ ~~date~~ ~~to~~ July 8 1963

(III) The statutory provision conferring jurisdiction on your Honorable Supreme Court to review said judgment and decision by Certiorari is that contained in the Act of Congress of June 25, 1948, C. 646, 62 Stat. 929, reading thus:

> "Final judgments or decrees rendered by the highest Court of a State in which a decision could be had may be reviewed by the Supreme Court as follows: . . . (3) By writ of Certiorari where the validity of a treaty or statute of the United States is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised, under the United States"; (28 U. S. C. A. #1257(3)).

QUESTIONS PRESENTED FOR REVIEW.

I. After an adjudication absolute by the Orphans' (probate) Court and distribution thereunder, is not the property thus awarded and distributed (regardless of the temporary possession of a stock certificate elsewhere in corporate liquidating trustees) vested in the living distributee so that any taking thereof, without notice and opportunity to defend, is a deprivation of property without "due Process of Law" in violation of the 5th and 14th Amendments of the U. S. Constitution?

II. Where administrators d.b.n.c.t.a. claim recoupment of an alleged Federal Estate Tax penalty against a living distributee and his vested property, do not the "Due Process" clauses of the 5th and 14th Amendments, U. S. Constitution, require that notice be given, and hearing afforded to such living distributee to defend against such alleged penalty in the U. S. Tax Court before such distributee can be made liable therefor?

III. Is not the Pennsylvania Estate Tax Proration Act of July 2, 1937, P. L. 2762, 20 P. S. #844, allowing proration of estate taxes paid by fiduciaries against heirs and legatees, without requiring notice by such fiduciaries to, and opportunity for a hearing by, such heirs and legatees before such tax liability is imposed and paid, unconstitutional and void as a deprivation of property without Due Process of Law in violation of the 5th and 14th Amendments, U. S. Constitution?

IV. Where the U. S. Tax Court finds "no Federal Estate Tax deficiency due", and also fails to find any "fraud," is it not illegal, because violative of the United States Internal Revenue Code and of the "Due Process" clauses of the United States Constitution, for Administrators to stipulate and pay an alleged "fraud penalty" without giving notice and a hearing-opportunity to the vested distributee to be charged therewith?

V. Is not Section 3612(d)(2) of the U. S. I. R. Code, which derives from R. S. Section #3176 and dates from 1864 (52 years *before* first enactment of a Federal Estate Tax in 1916), which dealt only with fraudulent returns of goods, wares, and merchandise, and which never, either specifically or by implication, imposed penalty of "50% of tax" for "fraud" in estate tax returns, so wholly inapposite and inapplicable as to render the "one-half of 50% tax penalty", herein paid by Administrators, illegal and uncollectible by proration or recoupment against legatees?

U. S. CONSTITUTION INVOLVED.

Fourteenth Amendment.

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws".

STATEMENT OF THE CASE.

Winfred S. Hurst died November 7, 1949, leaving a will dated September 4, 1944, appointing Harry J. Alker, Jr. as his executor and trustee of two separate trust funds thereunder. The decedent, out of his residuary estate, firstly, created said two trust funds, one of which was in favor of his mother, in the amount of $100,000.00 and which also gave her power of appointment of $25,000.00; secondly, he bequeathed substantial amounts of money to various individuals, three of whom are residuary legatees; and, thirdly, he divided, equally, the remaining balance of his said residuary estate among eight persons, one of whom being Harry J. Alker, Jr.

Harry J. Alker, Jr. qualified as such executor and, on February 4, 1951, filed the estate's Federal tax return; and a tax of $112,723.40 was paid thereon.

On June 22, 1955, after diver[illegible]ceptions had been taken, an adjudication of said executor's First and Final account was filed. On August 17, 1955, after disputes had been adjudicated by written agreement, a supplemental and definitive adjudication embodying said agreement was de-

creed by Judge VanRoden (specially presiding) in which one-eighth of the stock balance for distribution, namely 162½ shares of Dublin Hosiery Mills, Inc. was awarded to the appellant.

On January 3, 1956, distribution was made in accordance with said adjudication awards, and 162½ shares of "Dublin Mills" stock were transferred to and registered in the name of, Harry J. Alker, Jr., distributee, and petitioner herein. Later, custody of the certificate for said shares of stock, however, was temporarily lodged, pursuant to the agreement aforesaid, with the escrow agents.

On April 12, 1956, petitioner was removed as executor of this estate by Judge VanRoden in a decree which recited: "and this removal is not made by reason of any dereliction of duty of any sort by the said Harry J. Alker, Jr." Shortly thereafter, Russell C. Pullinger and Gilbert A. Sitler were appointed administrators d.b.n.c.t.a.

While Harry J. Alker, Jr., was executor, the Commissioner of Internal Revenue determined that there was a deficiency due by said estate, which said executor protested, and filed a petition in the Tax Court of the United States under Docket No. 52266. After said executor was succeeded by said administrators, the Commissioner of Internal Revenue filed amended answers in said action, alleging that petitioner had not included as an asset, a certain sum of $35,000.00 in the estate return, which petitioner claimed did not belong to the testator.

The said administrators and their counsel held several conferences with personnel of the Internal Revenue Service, endeavoring to settle said allegations as well as several others, including claimed credits for commissions by petitioner as such executor, counsel for said executor, disallowed commissions to brokers on sales of real estate, evaluation of estate assets, and the counsel fee of administrators' counsel.

As a result of these conferences, on March 13, 1959, without any interim or other notice to petitioner, and with-

out having afforded petitioner any opportunity to be heard in defense to any alleged civil "fraud" the said administrators stipulated with the Commissioner of Internal Revenue for entry of decision by the Tax Court of the United States of a 50% addition to the tax of $28,180.78, purportedly under Section 3612(d)(2) of the Internal Revenue Code of 1939, without however stipulating or admitting any "fraud" and without said Tax Court finding or deciding any "fraud".

The Tax Court, per Murdock, C. J., on March 20, 1959, without inquiring into the validity of said "half-penalty" and without finding any "fraud" to support it, entered a decision, to wit: "Pursuant to written stipulation signed by counsel for the parties in the above named case and filed with the Court on March 13, 1959 at Washington, D. C. it is Ordered and Decided: That there is no deficiency in estate tax due from, nor overpayment due to, the petitioner. That without considering the assessment made subsequent to the issuance of the deficiency notice, there is a deficiency in addition to tax under Sections 3612(d)(2), I. R. C. 1939, due from the petitioners, in the amount of $28,180.78."

On July 17, 1959, the said administrators filed in the Orphans' Court of Montgomery County, Pennsylvania, their two petitions involved herein; one to apportion said penalty of $28,180.78 against petitioner, the other to compel the liquidating trustees of "Dublin Mills" to deliver to them the petitioner's said vested stocks, both of which requests were granted by the said Orphans' Court.

The petitioner appealed from the said Orphans' Court's opinion and decision to the Supreme Court of Pennsylvania, maintaining that the lower Court erred in apportioning said penalty against petitioner; that such apportionment was not authorized by law, that it was a violation of petitioner's rights under the 5th and 14th Amendments of the Constitution of the United States and of the Constitution of the State of Pennsylvania as to due process of law and equal protection of the law; and by mistake of fact and law and

use of the wrong Federal statute in arriving at a penalty tax, if any such should have been found, which is denied by petitioner.

The Supreme Court of Pennsylvania, on March 19, 1963, in a "per curiam order" without opinion upheld the lower Court's opinion, wherefore this petition for certiorari.

The decedent, Winfred S. Hurst, lived at 525 Willow Grove Avenue, Wyndmoor, Montgomery County, Pennsylvania, with his mother, Annie E. Hurst, who survived him. Mr. Hurst was a well-established certified public accountant in the City of Philadelphia, well versed in Federal tax matters, and was very friendly with petitioner, as well as being represented by petitioner, then a practicing lawyer in Philadelphia and Montgomery counties, Pennsylvania. It is believed, however, that Mr. Hurst drew his own last will. This friendship between decedent and petitioner was recognized and proven by decedent willing and bequeathing to petitioner a 1/8th share of his residuary estate as well as appointing him executor of his will and trustee of said trusts as provided in his last will.

REASONS FOR ALLOWANCE OF THE WRIT.

1. The $28,180.78 proration judgment against petitioner's vested property, entered by the lower Court despite respondents' lack of notice to petitioner and without a hearing opportunity for petitioner to defend against it before respondents' stipulation and payment thereof, is a taking and deprivation of petitioner's property without "Due Process" in violation of the 5th and 14th Amendments, U. S. Constitution.

2. The Pennsylvania Estate Tax Proration Act of July 2, 1937, P. L. 2762, 20 P. S. §844, allowing estate tax proration judgments to be entered against legatees in favor of Fiduciaries without requiring prior notice and a hearing

opportunity to such legatees before said tax liability is imposed, is unconstitutional and void as an invalid deprivation of property without "Due Process of Law" in violation of the 5th and 14th Amendments, U. S. Constitution.

3. The respondents' (administrators') payment of an alleged "one-half of 50% fraud-penalty" by their stipulation and voluntary submission to a United States Tax Court judgment therefor, when said Tax Court found "no Federal Estate Tax deficiency due" and also failed to find "any fraud", was invalid and unauthorized by Section 3612(d)(2) U. S. I. R. Code (governing only excise taxes on wares and merchandise) and hence is illegal and uncollectible by proration, recoupment, or otherwise.

ARGUMENT.

(a) Both the Supreme Court of Pennsylvania and the Orphans' Court of Montgomery County, Pennsylvania, have entered against petitioner herein a $28,180.78 judgment in favor of respondents, the administrators, d.b.n.c.t.a. of this Winfred Hurst Estate, on the latters' mere petition. This was done despite the fact that said Administrators admitted that they had voluntarily incurred that liability by stipulating with the United States Internal Revenue Service for an alleged compromise "one-half of the 50% fraud penalty" supposedly imposed by Section 3612(d)(2) of the United States Internal Revenue Code.

Respondent-administrators also admitted (pp. 51a, 52a of the printed Record, and page 199 of the original record) that they had never given petitioner, Alker, any notice of their said proceedings in United States Tax Court, nor had they afforded him any opportunity to be heard thereon before such alleged liability was imposed therein.

The Pennsylvania Orphans' Court in its opinion (Record p. 85a), affirmed per curiam by the Supreme Court of Pennsylvania, said:

> "It cannot earnestly be contended that the successor administrators . . . should have turned to him or attempted to satisfy him in their solution."

Petitioner respectfully insists that "satisfaction with respondents' solution" was not the point involved. On the contrary, the gist of their invalid action (now affirmed by both Pennsylvania Courts below) was their *complete disregard* of the *minimal requiremnts* of *Due Process of Law*, their failure and refusal to give any notice whatever to petitioner of their action, and their *utter neglect to afford* petitioner any *opportunity to be heard* in that Court *before* the liability for $28,180.78 could be imposed by a judgment of any kind in any Court. It is no answer to

this neglect for respondents now to say that petitioner was duly heard in the Pennsylvania Orphans' Court below, since by that time the liability, if valid at all, had already attached by entry of the United States Tax Court judgment without notice to petitioner or hearing thereon. The alleged "hearing" in the Pennsylvania Orphans' Court below was nothing more than the hollow mockery of the old adage about "locking the barn door after the horse is stolen." In the Courts below the liability, if valid at all in United States Tax Court, had already been imposed and paid by the Administrators, and these respondents were there asking said Pennsylvania Courts merely to "rubber stamp" the *functus officio* entered without Due Process to petitioner in the United States Tax Court.

If illustration of so basic a proposition be needed it will be found in the language of the honorable Supreme Court of Pennsylvania, speaking through Mr. Justice Stern, *In re Gelli's Estate*, 340 Pa. 561 (1941), 17 A. 2d 899, at page 903, as follows:

> "Nevertheless, when the third account was filed, defendant ignored plaintiff's claim, and, instead of notifying them and leaving the problem to the court for solution, *it not only undertook to decide* the question *on its own responsibility, but unfortunately decided it erroneously;* it represented to the court that one-half of the Edward Roberts share should be awarded to the Meigs children, which, accordingly the court did, not knowing, of course, that the parties opposed to such a distribution had not been notified of the proceedings and that their absence therefore did not imply acquiescence in making the award as prayed by defendant. *Under such circumstances the distribution, as far as plaintiff's rights are concerned, was wholly void.* Comm. v. Green, 4 Whart. 531, 568; McKee v. McKee, 14 Pa. 231 *; Comm. v. Rogers, 53 Pa. 470, 475; Thompson v. Stitt, 56 Pa. 156, 160; Richards v. Rote, 68 Pa. 248, 252; * * * In Re Shugars' Estate, 312 Pa. 472,

167 A. 567; Krug v. Keller, 8 Pa. Super. 78, 82. In the Shugars case, 312 Pa. at pages 476, 477, 167 A. at page 569, the court said: "Because of *the failure to give the actual notice required* by statute, *the decree* ordering distribution *was void as to appellant's claim. It could have no possible effect upon it. Such notice was indispensably necessary to give jurisdiction, and, without such notice and an opportunity to appellant to be heard, the decrees of the court were absolutely void.*" (Emphasis ours.)

In the footnote to the *McKee* case (*), *supra*, this Court emphasized:

> "*The anxiety of the lawmakers* to secure to defendants a day in court, after due notice, so sedulously manifested, *is but in accordance with the principle that before the rights of an individual can be bound by a judicial sentence, he shall have notice of the proceedings against him. This is announced to be an axiom of natural justice and of universal application,* by Marshall, C. J., in the Mary, 3 Peters' C. R. 312." (Emphasis ours.)

Law Lacks "Due Process".

(b) The Pennsylvania Estate Tax Apportionment Act of July 2, 1937, P. L. 2762, 20 P. S. 844, applicable to and actually applied in this case, is unconstitutional and void because it fails utterly to provide for the giving of notice or for affording an opportunity to be heard to the legatees and heirs against whom said Act authorizes such proration judgments to be entered. Obviously, the only kind of notice and opportunity to be heard that could ever be worth anything to this petitioner, or to any other legatee, or that might even be regarded as any kind of minimum compliance with said "axiom of natural justice and of universal application" in our United States and State constitutions is that which these respondents did not give to petitioner

while they were seeking to impose a liability in the United States Tax Court that they, admittedly, intended to demand, and did demand, of this petitioner in the Pennsylvania courts below. As the Pennsylvania Supreme Court so aptly said in the *Galli Estate, supra*, "They not only undertook to decide the question on their own responsibility, but unfortunately decided it erroneously." We therefore respectfully suggest disagreement with the learned Orphans' Court below by "earnestly contending here", as was done also below, that the "successor administrators" (respondents herein) ought most certainly to have given this petitioner notice and an opportunity to be heard in the United States Tax Court in direct opposition to their alleged "laborious great responsibility and problems" there. The respondent had no right voluntarily to make an independent erroneous commitment for a $28,000 liability intended to be assessed against petitioner, in his absence without notice and hearing thereon, and then demand that a Court relieve them of their neglect to afford "Due Process".

> "Extra-official or casual notice, of a hearing granted as a favor or discretion in proceedings for the taking of one's property to satisfy his alleged debt or obligation, is not a substantial substitute for the due process of law which the United States Constitution, 14th Amendment, requires." *Coe v. Armour F. Works*, 237 U. S. 413, 35 Sup. Crt. Rep. 625, 59 Law Ed. 1027.

This is especially true where, as here, the Pennsylvania Orphans' Court below to which respondents thereafter applied for such unwarranted relief was wholly without jurisdiction to grant such applications.

In *Forry's Estate*, 246 Pa. 448 (1914), 92 A. 697, the Pennsylvania Supreme Court held "Where no application was made to open a decree confirming the audit of administrators' accounts, the Orphans' Court was without jurisdiction . . . to re-distribute the estate."

In *Washington, ex rel., Oregon R. & Nav. Co. v. Fairchild*, 224 U. S. 510, 32 Sup. Crt. Rep. 535, 56 L. Ed. 863, this honorable United States Supreme Court held:

> "The *hearing* which must precede the taking of property is not a mere form but the *owner must have the right* to secure and present evidence material to the issue under investigation, must be given the opportunity by proof and argument to controvert the claim asserted against it before a tribunal bound not only to listen but also to give legal effect to what has been established."

These fundamental and salutary requirements were never accorded to your petitioner in this estate tax (penalty) controversy. Hence, this Court's writ of certiorari to review such an erroneous judgment below ought to be granted.

As to section 844 of the Estate Tax Apportionment Act of 1937 (20 P. S. 844) it is contended by petitioner that this section was designed only to operate as between specific legatees and beneficiaries of the residue by charging the former with their fair proportionate share of estate taxes in relief of latter upon whom brunt of the entire tax burden would otherwise fall. That it was intended to achieve equality of tax contribution and to relieve distributees from inequalities resulting from imposition of the Federal estate tax. It is further contended that the said provision of the 1937 Act was not designed or intended by the legislature to be used in a matter of the instant kind. That it is entirely foreign to the purpose of the legislators to suppose that the equality which they desired to create could be thwarted by an arbitrary act of a Court in apportioning against solely one party or person of several jointly and severally liable therefore.

See *Edwards Estate*, 377 Pa. 606, 105 A. 2d 312;
Wahr's Estate, 370 Pa. 382, 88 A. 2d 417;
Mack's Estate, 74 Pa. D. & C. 385.

In further support of petitioner's contention that said penalty or addition to the tax should not be solely apportioned against petitioner, it is claimed that the decedent himself did not desire the apportionment act to control in his estate. He makes the following provisions in his last will, to wit:

Paragraph "Fifth"—"All the foregoing legacies shall be free and clear of all transfer, legacy, succession, estate and inheritance taxes, and any such taxes thereon shall be paid by my Executor out of the principal of my residuary estate."

Sixth (a)—"* * * The income and principal payable to my mother and applicable to her support shall be free and clear of all transfer, inheritance, legacy, estate and succession taxes, and all such taxes thereon shall be paid by my Executor or Trustee out of the principal of my residuary estate."

Sixth (b)(7)—"The foregoing legacies and bequests shall be free and clear of all transfer, legacy, succession, estate and inheritance taxes, and any such taxes thereon shall be paid by my Executor out of the rest of my residuary estate."

These foregoing will provisions certainly indicate the decedent's intention to accomplish a particular result and that is the payment of all such estate taxes by his residuary estate and not just by one sole 1/8th distributee. Decedent was a successful accountant, with a full knowledge of tax matters; was of substantial wealth, and drew his will with great care. See *Widener's Estate*, 81 D. & C. 106 (Pa.).

Inasmuch as said will provisions constitute a direction against the Apportionment Act and as such 50% penalty has been held to be part of the tax, as an addition to same, it should also be borne entirely by the principal of the testamentary residuary estate.

See *Mellon's Estate*, 347 Pa. 520.

In the United States Tax Court civil case there was no fraud admitted, found, or stipulated. Nor was there any Estate Tax deficiency found. On the contrary, there was a specific finding of "no deficiency in estate taxes due". Therefore, absent a deficiency there could be no additional Federal Estate tax due, and without a deficiency or a finding of fraud, there could be no lawful assessment or valid judgment for a fraud penalty in any amount.

The One-half Penalty of some $28,000.00 (being allegedly "half of the 50% addition to the Estate Tax"), stipulated and voluntarily paid by appellees under judgment of the U. S. Tax Court, per Murdock, C. J., was purported therein to have been authorized by section #3612(d)(2) of the U. S. I. R. Code. The historical note in Title 26, U. S. C. A. #3612(d)(2) shows, however, that this section derives from Section #3176, R. S., as amended by the following Acts: Mar. 1, 1879, C. 125, 20 Stat. 331; Aug. 27, 1894, C. 349, sec. 34,28 Stat. 559; Oct. 3, 1913, C. 16, secs. II, I, 38 Stat. 179; Sept. 8, 1916, C. 463, sec. 16, 39 Stat. 773; Feb. 24, 1919, C. 18, sec. 1317, 40 Stat. 1147; Nov. 23, 1921, C. 136, sec. 1311, 43 Stat. 339; Feb. 26, 1926, C. 27, sec. 1103, 44 Stat. 112, and Aug. 30, 1935, C. 829, sec. 406, 49 Stat. 1027. Said R. S. sec. #3176 was in nature a revision of Acts of June 30, 1864, C. 173, sec. 14, 13 Stat. 226; July 13, 1866, C. 184, sec. 9, 14 Stat. 101, and Dec. 24, 1872, C. 13, sec. 2, 17 Stat. 402. It is therefore quite obvious that this R. S. #3176, going back historically, as it does, to the year, 1864, antedated Federal Estate Taxes by more than half a century. Merten's "Law of Federal Gift and Estate Taxation" says: "The present Federal Tax on transfers of property at death *dates from 1916.*" This enactment was 52 years after R. S. sec. 3176 was first adopted at the close of the Civil War.

That section, now #3612(d)(2), reads, inter alia, as follows:

> "Section 3176. If any person, corporation, company, or association fails to make and file a return or list

at the time prescribed by law * * *, or makes wilfully or otherwise, a false or fraudulent return or list, the collector or deputy collector shall make the return or list from his own knowledge and from such information as he can obtain through testimony or otherwise. * * * In case a false or fraudulent return or list is wilfully made, the Commissioner shall add to the tax 50 per centum of its amount * * *."

This section #3612(d)(2) follows other apposite sections relating to the duty of collectors to canvass their districts for taxable persons and objects (26 U. S. C. A. #3600); the entry of premises for examination of taxable objects during the day or night (sec. #3601); search warrants (sec. #3602); and the making of a list or return of "articles, objects, goods, wares, and merchandise, made or sold and charged with or liable to pay any tax" (sec. #3611). From these juxtapositions, as well as from the historical derivations above-stated, long antedating the imposition of any Federal Estate Tax, it should be abundantly clear that R. S. #3176, now and in 1955 being Sec. 6653(b) of the 1954 Internal Revenue Code and being Sec. 3612(d)(2) of the 1939 Internal Revenue Code under which the court below and the U. S. Tax Court acted, is, and was then, applicable *only to excise taxes on goods, wares, and other objects*, and that it never was, by any Congressional legislation, made specifically applicable to Federal Estate Taxes. The latter application occurred only in the erring minds of some Internal Revenue agents who seem to have been so persistent in their errors and so vociferous in their mistaken demands as to have frightened the appellees into making an illegal and invalid payment of some $28,000.

Admittedly, these errors were probably induced by, and followed, the Treasury Department regulations which purported to interpret Sec. 3612(d)(2) as imposing a 50% penalty on the total tax due, rather than on the deficiency only, but it is also obvious that erroneous Treasury Depart-

ment regulations are not Congressional legislation, and cannot enlarge the impositions actually enacted by Congress.

The following appellate court cases would likewise appear to support appellant's contentions herein:

Dillon v. United States, 218 F. 2d 97; and
Berra v. United States, 221 F. 2d 590; 351 U. S. 131, 100 L. Ed. 1013, 76 S. Ct. 685.

Similarly, corroboration of appellant's views is shown by the U. S. Senate and House Committee Reports pertaining to Sec. 3612(d)(2), as found in "U. S. Code Congressional and Administrative News", vol. 3 (83rd Congress, second session), wherein, at pages 4780(K) and 4135(K), both branches say: "(1) The additions to the tax (5% for negligence or wilful disregard, and 50% for fraud) are to be *applied to deficiencies or underpayments*, and *not* to the whole tax as is *presently true* in the case of the excise taxes." Like pronouncements are repeated on page 4567 in the House Report, and on page 5241 of the Senate Report. Hence, in the case at bar, where, admittedly, there is not, and never was, any deficiency in the Estate Tax due the Government, there never was, nor could have been, any fraud, and thus no "fraud" penalty in any amount could legally be laid on this estate. Furthermore, even if such a penalty could have been lawfully imposed, it could only be adjudged for 50% of any deficiency in the tax, as paid, and inasmuch as there was no underpayment by appellant of the $112,723.10 sent to the Internal Revenue Collector with his Estate Tax return, the alleged "fraud" penalty of half the I. R. agents' claim was illegally stipulated and paid by appellees on an improper "compromise agreement" submitted by them to the U. S. Tax Court.

"Fraud" is never assumed. It must be alleged, and proved by clear and convincing evidence. As it was not admitted, stipulated, or found as a fact by the U. S. Tax Court for a necessary prop to support its judgment, the

whole basis for the alleged "penalty" was lacking, and the learned Court below could not assume its existence. Hence, its orders, founded on the presumed legality of an invalid judgment, should be reversed.

Section 3612(d)(2) of the Internal Revenue Code of 1939, to wit, "Fraud, in case a false or fraudulent return or list is willfully made, the Commissioner shall add to the tax 50 per centum of its amount," does not apply to estate taxes as far as the 50% of the full tax is concerned.

This provision is modified by section 871(i) of the Internal Revenue Code of 1939, which provides, as follows: "50 per cent addition treated as a deficiency. The 50 per centum addition to the tax provided by Section 3612(d)(2) shall, when assessed in connection with an estate tax, be assessed, collected, and paid in the same manner as if it were a deficiency, except that the provisions of Section 891 shall not be applicable" (26 U. S. C. A. 871).

This subsection is taken from Act, February 26, 1926, C. 27, § 308(j), 44 Stat. 76, which provides, "The 50 per centum addition to the tax provided by Section 3176 of the Revised Statutes, as amended, shall, when assessed after the enactment of this Act in connection with an estate tax, be assessed, collected and paid in the same manner as if it were a deficiency, except that the provisions of subdivision (h) of this section shall not be applicable."

Section 307 of said Act of 1926 defines "deficiency" to mean: "The amount by which the tax imposed by this title exceeds the amount shown as the tax by the executor upon his return: but the amount so shown on the return shall first be increased by the amounts previously assessed (or collected without assessment) as a deficiency, and decreased by the amounts previously abated, refunded, or otherwise repaid in respect to such tax; or (2) * * *".

As previously claimed by petitioner the decree of apportionment directed against him is based upon error and mistakes of facts and law and failure to comply with the correct federal statutes.

Said $28,180.78 addition to the tax (or penalty) should never have been agreed to by the administrators d.b.n.c.t.a. as there was never found to be a tax deficiency upon which a penalty could be based.

Paul on Federal Estate and Gift Taxation, Vol. I, Section 13:68 (ad valorem penalties for false or fraudulent returns (page 807) states:

"The statute also provides a severe 50% penalty or addition to the tax in the case of a false or fraudulent return. This 50 percent addition to the tax is to be treated as a deficiency."

The legislative history following Section 6653(b) of the Internal Revenue Code of 1954 refers to House Report No. 1337 and Senate Report No. 1662.

The House report states:

6653. Failure To Pay Tax

"For all taxes for which returns are required, this section prescribes additions to the tax, corresponding to those of existing law relating to the income tax, for underpayments of tax resulting from negligence (5 per cent of the underpayment) or fraud (50 per cent of the underpayment). *Existing law* imposes a 50% addition in the case of fraud, applicable to *all taxes*, but in the case of *taxes other than income, estate and gift*, that addition is based on the total amount of tax imposed. Another change provided in this section is the substitution, for the penalty provided in existing law, of an amount equal to the amount of any stamp tax evaded or not paid, of an addition to the tax of 50 per cent of the total amount of the underpayment of such tax."

The Senate report states:

6653. Failure To Pay Tax

"* * * For all taxes for which returns are required, this section prescribes additions to the tax, corresponding to those of existing law relating to the income tax, for

Estate of Harry Stoll
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underpayments of tax resulting from fraud (50 per cent of the underpayment). *Existing law* imposes a 50 per cent addition in the case of fraud, applicable to all taxes, but, *in the case of taxes other than income, estate and gift*, that addition is based on the total amount of tax imposed. * * *".

Emphasis supplied by petitioner.

Here, Congress itself, has spoken as to what it actually considered the law to be, regarding such an estate tax fraud penalty, and so, it should be so interpreted by the Courts.

CONCLUSION.

It is respectfully submitted that in consideration of the foregoing reasons evidenced by petitioner, the Petition for a Writ of Certiorari should be granted by this Honorable Court.

WHEREFORE, petitioner prays that Writ of Certiorari be granted.

Respectfully submitted by

JAMES J. REGAN, JR.,
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Nancy J. Regan
Petitioner

Office-Supreme Court, U.S.
FILED
JUL 8 1963
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1963.

No. 261

ESTATE OF WINFRED S. HURST, Deceased:

HARRY J. ALKER, JR.,

Petitioner.

APPENDIX TO PETITION FOR ALLOWANCE OF WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA AND THE ORPHANS' COURT OF MONTGOMERY COUNTY, PENNSYLVANIA.

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Appendix.

[65]

IN THE
SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT.

No. 174, January Term, 1962.

Appeal From the Orders of the Orphans' Court of Montgomery County, Pennsylvania at No. 55113.

ESTATE OF WINFRED S. HURST, DECEASED.

OPINION OF THE COURT.

PER CURIAM: FILED: March 19, 1963

The decree of the Orphans' Court of Montgomery County is affirmed on the opinion of President Judge Taxis, reported in — D. & C. 2d —. Each party to pay own costs.

OPINION OF ORPHANS' COURT OF MONTGOMERY COUNTY, PENNSYLVANIA, SUR PETITION FOR APPORTIONMENT OF FEDERAL ESTATE TAX AND PETITION FOR ORDER TO TURN OVER ASSETS.

Appearances:

HIGH, SWARTZ, CHILDS AND ROBERTS, by VICTOR J. ROBERTS, ESQ., and SCHNADER, HARRISON, SEGAL AND LEWIS, by J. PENNINGTON STRAUS, ESQ., and MARTIN H. YUSEM, ESQ., and WILLIAM A. BARNES, ESQ., for Russell C. Pullinger and Gilbert A. Sitler, administrators d.b.n.c.t.a., petitioners;

LEON H. FOX, ESQ., and WILLIAM B. ALLEN, ESQ., for Harry J. Alker, Jr., respondent in Petition for Apportionment of Federal Estate Tax and intervener in Petition for Order to Turn Over Assets;

DESMOND J. MCTIGHE, ESQ., and JEAN B. GREEN, ESQ., and LABRUM AND DOAK, for J. Harry LaBrum and Gilbert Pleet, respondents in Petition for Order to turn Over Assets;

HENRY R. HEEBNER, JR., ESQ., Assistant United States Attorney, and WILLIAM J. HAGEN, ESQ., Regional Counsel, Internal Revenue Service, for United States of America, intervener and attaching creditor of Harry J. Alker, Jr.

TAXIS, *P. J.*

The two petitions before the court were filed on July 17, 1959. The first is the petition of Russell C. Pullinger and Gilbert A. Sitler, administrators d.b.n.c.t.a. of the Estate of Winfred S. Hurst, deceased; and it sets forth in brief that the petitioners are successor fiduciaries to Harry J. Alker, Jr., executor, who, on or about February 4, 1951,

filed a false and fraudulent Federal Estate Tax return for this estate. After prolonged negotiations, a penalty therefor was assessed against the estate in the amount of $28,180.78. The petition further recites that Harry J. Alker, Jr. is a residuary beneficiary under this decedent's will, and that the proceeding is instituted under the Estate Tax Apportionment Act of 1951. Finally, it requests that the aforesaid fraud penalty be apportioned solely against the share of Harry J. Alker, Jr. in the estate, and that the petitioners be authorized to collect any balance of the penalty not covered by such share by other legal process.

Harry J. Alker, Jr. filed an answer to the said petition denying its material averments, and also set forth new matter, alleging generally that the penalty in question was paid without consulting him or communicating with him in any way, and that by a supplemental adjudication of this court, dated December 8, 1955, he was relieved of further surcharges. A reply to this new matter was filed, and in addition, on October 5, 1960, the United States of America was granted leave to intervene because of its position as an attaching creditor of Mr. Alker's interest in the estate. The United States also filed an answer to the petition.

The second petition, also filed by Mr. Pullinger and Mr. Sitler, is directed against J. Harry LaBrum and Gilbert Pleet, liquidating trustees of Dublin Hosiery Mills. It recites that decedent owned 1300 shares of the stock of that corporation at his death, and that subsequent thereto it was dissolved and its remaining assets transferred to the respondents. It further sets forth that the petitioners have in their possession a certificate for 162½ shares of the corporate stock, and that the trustees hold funds representing the corresponding dissolution dividend. The petition also sets forth that it is brought under § 501 of the Fiduciaries Act of 1949, and requests that the trustees be ordered to turn over the dividends in their possession to the petitioners.

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The liquidating trustees filed an answer to this petition, and in new matter recite that they have refused distribution of the money in question because Harry J. Alker, Jr. is record owner of the stock in question, and because the said trustees were served, on July 11 and 12, 1957, with a Federal tax levy prohibiting the distribution of the dividends held by them. The liquidating trustees request this court to award "the subject fund to such persons as may be found legally entitled thereto," and to award the trustees their costs in this proceeding, including counsel fees. This new matter was put in issue by a reply, and both the United States and Harry J. Alker, Jr. have intervened and filed answers.

Winfred S. Hurst died on November 7, 1949. The Federal Estate Tax return for his estate was filed by Harry J. Alker, Jr., executor, on or about February 4, 1951. Issues arose relating to the valuation of assets, with the result that final determination of the total tax liability had not been made by June 22, 1955, when the first adjudication was filed by this court. This adjudication dealt with many problems which had arisen during Mr. Alker's administration, including extensive surcharges against him, and was followed on August 17, 1955, by a settlement agreement between the various parties, purporting to cover the remaining disputes. Such agreement was incorporated in a supplemental adjudication which, among other dispositions, awarded to Harry J. Alker, Jr., residuary legatee, 1/8 of the shares of Dublin Hosiery Mills, Inc. owned by the estate. This award was made ". . . . subject to the payment of such additional Federal Estate Taxes and Pennsylvania Transfer Inheritance Taxes as may properly be found to be due. . . ."

The supplemental adjudication also appointed three escrow agents, Robert H. Rissinger, Martin H. Yusem, Esq., and J. Pennington Straus, Esq., to take possession of the balance of the assets of the estate from Mr. Alker. These

agents received about $24,000 in cash and the 1300 shares of Dublin Hosiery Mills, Inc. Since it appeared at that time that the maximum additional tax liability could not exceed $18,000, the Dublin shares were transferred of record to the distributees named in the adjudication. Thus, on January 3, 1956, 162½ of the said shares were registered in the name of Harry J. Alker, Jr., and a stock certificate issued in Mr. Alker's name. The certificate was delivered to Mr. Rissinger, as Mr. Alker's representative on the board of escrow agents, and is presently held by the administrators.

On March 8, 1956, Mr. Alker was indicted in the United States District Court for attempting to evade and defeat estate taxes in this estate. He was removed as executor about two months later, and was succeeded by Mr. Pullinger and Mr. Sitler. On April 8, 1957, he was convicted of the crime with which he had been charged. As a consequence, the United States Government asserted a civil penalty for fraud against the estate, which, under the Internal Revenue Code of 1939, § 3612(d)(2), amounts to 50% of the total tax due. Appeals in the criminal matter continued until November, 1958, when the Supreme Court of the United States denied certiorari. Over this period, the administraters and their tax counsel had, through many conferences and with great patience, convinced the Internal Revenue Service that there should be no Estate Tax deficiency assessed.

The Estate Tax paid at the filing of the return amounted to $112,723.10, and although the government agreed not to assess any deficiency in tax as such, it insisted upon a civil fraud penalty. The basis for this position was Mr. Alker's false and fraudulent act in omitting some $35,000 in cash from the original return. Again the administrators and their counsel negotiated diligently and ultimately convinced the government to accept a penalty of $28,180.78, one-half of the amount due under the Revenue Code. On March 30, 1959, this deficiency was assessed by

agreement, and shortly thereafter was paid in full. Several hundred dollars of this payment were provided by the distributees of the Dublin stock, other than Mr. Alker.

On July 11 and 12, 1957, as a result of other transactions, the Federal government levied on any property or interests in property of Mr. Alker held by the liquidating trustees. The liquidating dividends attributable to the certificate in Mr. Alker's name amount to approximately $9,600.

The petition for apportionment was filed under the Estate Tax Apportionment Act of 1951 (20 P. S. 881 et seq.). However, the effective date of that Act is August 24, 1951, and it does not apply to estates for which the original tax return was filed prior to that date. The applicable statute, therefore, is the Estate Tax Apportionment Act of 1937 (20 P. S. 844). This act requires that such taxes "be equitably prorated among the persons interested in the estate . . ." and provides that such equitable proration shall mean division among the beneficiaries in proportion to their respective distributive shares. The Act does not, however, touch upon the present situation, where a penalty has been incurred because of the actions of one of several distributees. In *Harvey Estate*, 350 Pa. 53, the Supreme Court quoted with Approval the following language in the opinion of the lower court: ". . . . it is unquestionable that the purpose of the Pennsylvania Act is to equitably apportion the burden of the tax. Therefore, in our opinion the application of the equitable doctrine of contribution demands that the tax be borne commensurately by those whose gifts contribute to the tax burden and conversely that there be eliminated from such burden all whose legacies do not in any way create or add to the tax." In that case the court was dealing with the problem of apportionment against the share of a charitable gift which qualified as a deduction for tax purposes, but the language used demonstrates that the principle being applied is substantive, and did not originate

with the language of either of the statutes mentioned. It is true that both statutes prescribe the equitable principles applicable to situations to which they apply; but neither purports to abrogate the duty of this court to apply the equitable doctrine of contribution under appropriate circumstances, simply because such circumstances relate to the payment of Estate taxes.

Upon this view, it is appropriate to note the language in § 3(c) of the 1951 Act (20 P. S. 883c), which, although technically inapplicable, indicates very clearly the present view of the Legislature in a situation such as this. The language is as follows:

> "When the orphans' court shall find that it is inequitable to apportion interest and penalties in the same manner as the principal of the estate tax by reason of special circumstances, it may direct apportionment of interest and penalties in a manner different from principal."

In the case at hand, Mr. Alker's action have been the sole substantial cause of a tax penalty of more than $28,000. Since no such penalty was contemplated at the time the supplemental adjudication was filed, there is no substance to the argument that that adjudication in providing as it did that the surcharges against Mr. Alker were to be eliminated, presents the apportionment here requested. The problem at hand initially arose after this adjudication was filed; and inevitably some apportionment must now occur, whether *pro rata* or otherwise, since additional taxes have in fact been paid. As a matter of fact, the adjudication expressly recognized that some Estate Tax problems remained open when distributions were made subject thereto. That the court or counsel did not foresee the exact nature or full extent of those problems cannot now be used to the disadvantage of wholly innocent persons.

Mr. Alker also complains that he was not a party to the tax settlement, that he was not consulted in regard to it, and

that the agreed penalty was unreasonable and should not have been paid. Without discussing the record at great length, the court can state that it is not convinced that Mr. Alker has been abused. It cannot earnestly be contended that the successor administrators, laboring as they did under great responsibility and confronted by unexpected problems created by Mr. Alker, should have turned to him or attempted to satisfy him in their solution.

The court concludes, therefore, that the relief requested in the petition for apportionment should be granted.

The petition to turn over assets is, in effect, an action to implement the relief sought in the petition for apportionment. At the present time, the sole asset against which the administrators can enforce their claims against Mr. Alker is the fund presently in the possession of the liquidating trustees. The trustees are essentially stakeholders, and have refused to pay over the fund because of prior claims thereto by Mr. Alker as distributee and the United States Government as lien creditor.

The petition to turn over assets recites that it is brought under § 501 of the Fiduciaries Act of 1949 (20 P. S. 320.501). However, the decedent in this case died about two months prior to the effective date of this law, and hence we must look to the law prior to the 1949 Act. The matter of possession of personal property of a decedent is not specifically covered by the Fiduciaries Act of 1917, but a reading of § 11(c) thereof (requiring all personal property to be included in the inventory of the estate) together with the authority of cases such as *Rumsey's Estate*, 287 Pa. 448, leaves no doubt that the administrators are entitled to possession of all personal property owned by the estate. There is thus ample basis for the petition outside the provisions of the Fiduciaries Act of 1949.

As to Mr. Alker's claim, little need be said. Although the stock was transferred to his name on the books of the corporation, and a new certificate therefor issued, he was never allowed to come into possession of either the cer-

tificate or any part of the proceeds of the liquidation. According to the testimony of J. Pennington Straus, Esq., it was not contemplated to make such distribution to any of the interested parties prior to 1957; by that time the probability of extensive additional tax liability because of Mr. Alker's actions had arisen, and both dividends and certificate were retained. There has, therefore, been no distribution to Mr. Alker, under which he could obtain rights prior to those of the estate against the fund in the hands of the liquidating trustees.

In regard to the claim of the Federal government under its levy, the Internal Revenue Code of 1954 provides, § 6321, that such a lien, when filed, encompasses all property or rights to property of the delinquent taxpayer, and in this respect is distinct from, for example, judgment liens, which under Pennsylvania law encumber only real estate in the absence of some execution process. Counsel for the United States has cited *United States v. Liverpool and London Insurance Company*, 348 U. S. 215, and *Bank of Nevada v. United States*, 251 Fed. 2nd 820 (9th Circuit). The facts of these cases are somewhat involved, and it is not necessary to detail them here. It is sufficient to point out that both of them deal with the matter of *priorities* between tax liens and, respectively, a writ of garnishment, and a set-off agreement between a bank and a depositor. Such authority, however, does not govern here, for Harry J. Alker, Jr. has at the present time no interest in the liquidating dividend in question, because of the decision of this court with respect to the apportionment question. Counsel for the United States recognizes that the tax lien can have no effect under these circumstances for he makes the following preliminary statement as a premise to his brief: "There is no question here that Mr. Alker had and still has a right to the monies now held by the liquidating trustees." This is not a correct statement, and the result is that the United States lien has attached nothing. The situation is no different in result from the

attachment of the interest of a distributee in an estate which ultimately winds up insolvent.

The liquidating trustees of the Dublin Hosiery Mills, Inc. have requested the court, in any award of the fund presently in their possession, to allow them to pay record costs and a reasonable counsel fee therefrom. This court has ample authority, of course, to allow counsel fees to fiduciaries, but its jurisdiction is generally limited to that situation, and no plenary power exists to award fees simply because a party is within the jurisdiction of the court. It is fundamental that the court, for example, has no jurisdiction to determine fees between a distributee and his attorney, unless the said attorney has a specific interest in or lien on the fund which legally raises him to the rank of a distributee as well. *Purman Estate*, 358 Pa. 187. No facts exist here which give counsel for the liquidating trustees any interest in this fund, nor are the trustees the type of fiduciaries to whom counsel fees may be awarded by this court. The trustees in this matter have been simply protecting their own interest, and the rule of *Sowers Estate*, 383 Pa. 566, applies.

Accordingly, the prayer of the petition to turn over assets is granted, and J. Harry LaBrum and Gilbert Fleet, liquidating trustees of the Dublin Hosiery Company, Inc., are ordered to pay over the liquidating dividends in their hands to Russell C. Pullinger and Gilbert A. Sitler, administrators d.b.n.c.t.a. of the Estate of Winfred S. Hurst, deceased. It is further ordered and decreed that the tax penalty of $28,180.78 shall be apportioned against the distributive share of Harry J. Alker, Jr., and that should such share ultimately be insufficient to satisfy the said penalty, the court upon application will enter a judgment for the deficiency or grant such other remedy as is appropriate.

By THE COURT,

ALFRED L. TAXIS, JR.,
President Judge.

Dated: September 1, 1961.

SUPREME COURT OF THE UNITED STATES

No. ....., October Term, 1962.

ESTATE OF WINFRED S. HURST, DECEASED;
HARRY J. ALKER, JR.,
Petitioner.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI.

Upon Consideration of the application of counsel for petitioner,

It Is Ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including

..... June 27 ....., 1963.

(S) William J. Brennan, Jr.,
Associate Justice of the Supreme Court of the United States.

Dated this .....14.....

day of .....June....., 1963.

SUPREME COURT OF THE UNITED STATES

No. ....., October Term, 1962.

ESTATE OF WINFRED S. HURST, DECEASED;
HARRY J. ALKER, JR.,
Petitioner.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI.

Upon Consideration of the application of petitioner,

It Is Ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, further extended to and including

..... July 8 ....., 1963.

(S) William J. Brennan, Jr.,
Associate Justice of the Supreme Court of the United States.

Dated this .....26.....

day of .....June....., 1963.

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AUG 9 1963
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1963.

No. 261.

ESTATE OF WINFRED S. HURST, Deceased:

HARRY J. ALKER, JR.,

Petitioner.

On Petition for a Writ of Certiorari to the Supreme Court of Pennsylvania.

BRIEF FOR RESPONDENTS IN OPPOSITION.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1963

No. 261.

ESTATE OF WINFRED S. HURST, DECEASED

HARRY J. ALKER, JR.,

Petitioner.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

BRIEF FOR RESPONDENTS IN OPPOSITION.

OPINIONS BELOW.

The opinion of the Orphans' Court of Montgomery County is not reported, but appears at R. 79a.* The per curiam opinion of the Supreme Court of Pennsylvania is not yet reported.

* Reference is made to the printed record filed in the Supreme Court of Pennsylvania, 9 copies of which have been filed by petitioner. The printed record includes 3 separate volumes: one captioned "Record", in which page numbers are followed with the letter "a"; one captioned "Supplemental Record", and one captioned "Brief of Appellees and Further Supplemental Record". Page numbers in the supplemental records are followed with the letter "b".

JURISDICTION.

The judgment of the Supreme Court of Pennsylvania was entered on March 19, 1963, and this Court extended the time for filing petitioner's Petition for Certiorari to July 8, 1963. Petitioner seeks to invoke the jurisdiction of this Court under 28 U. S. C., § 1257(3).

QUESTION PRESENTED.

Did the courts below unfairly determine (1) that a penalty for fraudulent evasion of federal estate taxes, incurred and paid by the estate of Winfred S. Hurst, should be apportioned solely against the petitioner; (2) that to implement apportionment, petitioner's undistributed legacy under the will of Winfred S. Hurst should be turned over to the administrators of the estate?

STATEMENT.

Winfred S. Hurst died testate on November 7, 1949. Petitioner, Harry J. Alker, Jr., was appointed his executor, and also named as one of eight residuary legatees entitled to share equally in 1,300 shares of Dublin Hosiery Mills, Inc.

Approximately four years later, petitioner, as executor, filed a first and final account to which several legatees excepted and, on June 22, 1955, the Orphans' Court of Montgomery County rendered an adjudication surcharging petitioner for $131,044.79 (R. 115b, 120b-123b). The court concluded that petitioner was "* * * unfit to represent and protect the interests of the beneficiaries in the settlement of this estate * * *", and directed his removal as executor (R. 123b). (A supplemental adjudication of December, 1955 (R. 23a-31a) approved an agreement of the parties

eliminating certain surcharges on condition that petitioner fulfill several stated conditions, but those conditions were never fully met.)

In 1953, petitioner had received a notice of federal estate tax deficiency. On March 25, 1954, he had filed a petition in the United States Tax Court for a redetermination of the tax. Accordingly, the Orphans' Court was aware of the estate tax difficulties, and specifically made its adjudication "* * * subject to the payment of * * * additional Federal Estate Tax which may properly be found to be due and owing * * *" (R. 118b). The supplemental adjudication of December 8, 1955, was also made "* * * subject to the payment of such additional Federal Estate Taxes * * * as may properly be found to be due * * *" (R. 29a).

In March, 1956, petitioner was indicted for submitting a false and fraudulent return in the Hurst estate. Specifically, he was charged with having willfully failed to include $35,000 in cash belonging to the estate. On April 8, 1957, he was convicted; and on May 13, 1958, his conviction was affirmed by the United States Court of Appeals for the Third Circuit. **United States v. Alker**, 255 F. 2d 851. On October 13, 1958, this Court denied certiorari.

From the time of the original and supplemental adjudications in 1955 until this Court's denial of certiorari in the criminal case in 1958, the civil estate tax proceedings in the Tax Court had continued. Petitioner, after his removal as executor, withdrew from the Tax Court proceeding, and the present administrators d.b.n.c.t.a. were substituted. On that same day, May 21, 1956, petitioner withdrew as counsel.

Thereafter, following petitioner's criminal conviction, on August 2, 1957, the United States increased the deficiency asserted against the estate to $31,029, and asserted a fraud penalty of $71,876.

Only after petitioner had sought and been refused review of his criminal conviction in this Court, were the

administrators able to conclude the Tax Court proceeding. After protracted negotiation, on January 21, 1959, the administrators were successful in persuading the Government that certain assets of the estate had been over-valued, and that certain challenged deductions were properly allowable, and in this way they had off-set the unreported $35,000 (R. 37a-44a). Hence, the Government agreed that no deficiency was due; but it continued to insist upon the payment of a civil penalty for fraud. In the end, the Government agreed to reduce the amount of the penalty from the $71,876.10 which it originally claimed, to $28,180.78 (R. 113b).

On March 20, 1959, the parties' stipulation for payment of the latter amount was embodied in a decree of the United States Tax Court (R. 114b). The $28,180.78 fraud penalty was paid from the administrators' cash account, and from contributions from all residuary legatees except petitioner (R. 44a).

Several months later, petitioner's criminal conviction was set aside, and a new trial granted, because it appeared that several of the jurors had known, when they rendered their verdict, that petitioner had previously been convicted for criminal evasion of federal income tax. **United States v. Alker**, 180 F. Supp. 661 (1959). Ultimately because petitioner was old and ill, and because he had already been imprisoned, the United States Attorney successfully moved to quash the indictment.

The determination of which petitioner now seeks review was made by the Orphans' Court on September 1, 1961 (R. 79a) and was affirmed, per curiam, by the Supreme Court of Pennsylvania. The court, on petition of the administrators (R. 4a), after petitioner had intervened (R. 24b-25b) and been heard, found (R. 84a) that "* * * Mr. Alker's actions have been the sole substantial cause of a tax penalty of more than $28,000. * * *," and entered a decree (R. 88a) apportioning the penalty solely against his distributive share of the residuary estate.

Petitioner's one-eighth interest in the testator's 1,300 shares of Dublin Hosiery stock had remained undistributed, pursuant to specific provisions in the supplemental adjudication of December 8, 1955 (R. 23a, 25a-27a, 29a). Then, the Orphans' Court had determined that distribution to him would have to await its approval of a final schedule of distribution, subsequent to the final settlement and payment of federal estate tax. In 1955, the shares were held by escrow agents who, thereafter, surrendered the original certificates to the issuing corporation, and received therefor eight new certificates, each for 162½ shares, in the names, respectively, of the eight residuary legatees. Certificate No. 22, drawn in the name of petitioner, was endorsed in blank (R. 35a) and retained by the escrow agents until 1956, when all of the assets of the estate were turned over to the newly appointed administrators d.b.n.c.t.a. The certificate was never delivered to petitioner.

To implement its apportionment decree, the court below directed the liquidating trustees of Dublin Hosiery to turn over to the administrators the liquidation dividends (approximately $9,600) representing petitioner's undistributed legacy (R. 88a).[1]

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1. The liquidating trustees resisted the administrators' claim simply because petitioner and the United States had made prior claims to the liquidation dividends, the latter as a tax lien creditor.

ARGUMENT.

Petitioner is not urging that he was denied his procedural rights in the 1955 adjudications (surcharging him for $131,000), or in the course of the criminal proceedings. He asserts that he was unfairly treated only with respect to the apportionment decree of 1961, and even this complaint is not related directly to the apportionment proceeding. In that proceeding, he had every opportunity to present his case.

The real gist of his constitutional argument, stripped of its repetition and its contrived, conclusory statements, is that the apportionment decree was unfair **because** the Tax Court proceeding, which resulted in the imposition of the penalty for fraud, upon the **estate**, was consummated without the requisite notice to **him**. He refers (Petition, p. 7) to "The $28,180.78 proration judgment" as one against his "vested property"; and he claims to have suffered "lack of notice" because he was not a party to the **Tax Court** proceeding which resulted in the penalty apportioned against him in the decree below.[2]

1. Petitioner had no "vested property". His distributive share was held by the estate, pursuant to the 1955 ad-

---

2. Petitioner also asserts (Petition, pp. 8, 15-20), that the initial imposition of the civil penalty by Internal Revenue was unauthorized by statute, but this assertion is patently erroneous. Putting aside the question whether this issue is properly raised in this case, Section 894(a) of the 1939 Internal Revenue Code, pertaining to estate tax, which petitioner has not cited to this Court, provides:

> "* * * False or Fraudulent Return.—For 50 per centum addition to the tax in case of a false or fraudulent return, see Section 3612(d)(2)".

Section 3612(d)(2) of the same code provides:

> "(d) Additions to Tax.—
>
> "(2) Fraud.—In case a false or fraudulent return or list is willfully made, the Commissioner shall add to the tax 50 per centum of its amount * * *".

judications, pending final distribution after settlement of all tax liability. The stock certificate representing his distributive share was never delivered to him. It was endorsed in blank and delivered, with his proxy, to the escrow agents who later turned it over to the administrators.

2. There was no improper "lack of notice" to petitioner in the Tax Court. He had no right to participate in that court; and he had every opportunity to challenge the decree of that court in the apportionment proceedings below. He did challenge it there, extensively, but he was unsuccessful.

a. Petitioner, after his removal as executor, was not a party to the proceeding in the Tax Court. The estate was the adverse party, and the estate, through its administrators, represented his interest and the interests of all the legatees in obtaining the lowest possible settlement with the United States.[3]

The settlement, which was embodied in a decree of the court pursuant to the parties' stipulation, was found by the court below to have been negotiated by the administrators "diligently" and "with great patience" (R. 83a, 82a).[4]

The Tax Court case began with the 1953 notice to petitioner, then acting as executor, of an estate tax deficiency. Petitioner himself petitioned for a redetermination of the tax. Thereafter, on May 21, 1956, following his indictment and his removal as executor, petitioner withdrew as a party

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3. Rule 6 of the Rules of Practice of the Tax Court provides:

> "A case in the Tax Court shall be brought by and in the name of the person against whom the Commissioner determined the deficiency (or liability, as the case may be), or by and in the full descriptive name of the fiduciary legally entitled to institute a case on behalf of such person."

And the Rules make no provision for intervention.

4. The negotiations which led to the settlement were fully explored in the court below (R. 37a-44a), and were the subject of lengthy cross-examination by petitioner's counsel (R. 50a-78a, 66b-103b).

from the Tax Court proceeding, in favor of the administrators, and he withdrew as counsel. The following year, he was convicted for filing a fraudulent return, but final settlement of the civil case between the estate and the Government had to await, in the Government's view, the Court of Appeals' affirmance of the conviction, and this Court's denial of the inevitable petition for certiorari. When this Court denied certiorari, the administrators were for the first time able to settle the civil suit.

Not only was petitioner fully aware of the civil suit; but in 1955, pursuant to the supplemental adjudication (R. 25a), he executed his power of attorney in favor of the administrators' counsel, authorizing them "* * * to appear for me and represent me before the Treasury Department, in connection with all matters involving Federal Taxes, Estate or Income, in which I, as Executor of the will of the said Winfred S. Hurst, am * * * a party * * *" (R. 32a). He authorized these attorneys "* * * to execute closing agreements, as fully as the undersigned might do if done by him personally", and he requested that "* * * all communications * * *" addressed to him "* * * be addressed to **them** * * *" (R. 32a, emphasis added). When the administrators were substituted as parties, and when he withdrew, he made no request for any notice of subsequent developments.

b. Nonetheless, in the court below, petitioner was given full opportunity to challenge the propriety of the proceeding in the Tax Court. He did attempt, without success, to show that the administrators had breached their duty to him when they agreed to pay the penalty, and hence that they should be surcharged; but he made no attempt to prove that he had filed a true return. The court below determined, on uncontradicted facts, that the administrators had acted fairly, and that petitioner's conduct was the sole cause for the imposition of the penalty. Accordingly, and following established equitable principles (**Mellon Estate**, 347 Pa. 520, 32 A. 2d 749, 1943), the court apportioned the penalty against him alone.

Clearly, the petitioner was not unfairly deprived of vested property, or of fair notice. His undistributed legacy was adjudged in 1955 to be contingent upon the final payment of taxes. He withdrew as a party and as counsel from the Tax Court proceedings, which left him no legitimate part in their ultimate disposition; and he was free to challenge and did challenge the fairness of the Tax Court ruling and of the apportionment, in the courts below. There was no lack of opportunity to be heard. His challenge was considered and correctly found to be totally lacking in merit.

CONCLUSION.

The judgment of the Orphans' Court, upheld by the Supreme Court of Pennsylvania, is a fair and sound determination. No question of general importance is presented by petitioner nor does the petition rest on any conflict of decisions. We urge, therefore, that the petition for certiorari be denied.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 261

ESTATE OF WINFRED S. HURST, DECEASED:

HARRY J. ALKER, JR., PETITIONER

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

This case arises out of a proceeding in the Pennsylvania Orphans' Court to charge the share of petitioner Alker in the Hurst estate with the additional federal estate taxes that were imposed upon the estate under Section 3612(d)(2) of the Internal Revenue Code of 1939[1] because of fraud committed by

[1] Section 3612(d)(2) reads as follows:

SEC. 3612. RETURNS EXECUTED BY COMMISSIONER OR COLLECTOR.

* * * * * *

(d) *Additions to Tax.*—

* * * * * *

(2) *Fraud.*—In case a false or fraudulent return or list is willfully made, the Commissioner shall add to the tax 50 per centum of its amount.

* * * * * *

(26 U.S.C. 1952 ed., Sec. 3612)

698-619—63

Alker, the original executor of the estate, in filing the estate tax return.

Hurst died on November 7, 1949. Alker was a residuary legatee and also the original executor of the estate. In February 1951, Alker filed the estate tax return and paid a tax of $112,723.10. The Commissioner, however, challenged the valuation of the assets and asserted a deficiency. Alker, as executor of the estate, filed a petition for redetermination in the Tax Court,[2] so that no final determination of the estate's tax liability had been made by June 22, 1955, when the first adjudication of interests in the estate was made in the Orphans' Court. This adjudication dealt with many problems which had arisen during Alker's administration, including extensive surcharges against him. It was followed on August 17, 1955, by a settlement agreement which was incorporated into a supplemental adjudication by the Orphans' Court which among other dispositions, awarded to Alker as residuary legatee certain shares of corporate stock owned by the estate. The award was made expressly subject to the payment of such "additional Federal Estate Taxes * * * as may properly be found to be due * * *." (Pet. App. 4a, 5a.) The stock was not delivered to Alker, but was placed in escrow.

On March 8, 1956, Alker was indicted for attempting to evade and defeat federal estate taxes, by omitting estate assets on the return. He was removed as

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[2] These proceedings, referred to in the petition as Tax Court Docket No. 52266 (Pet. 5), show that a deficiency tax of $17,292.23 was assessed against the estate by notice of December 23, 1953.

executor about two months later and was succeeded by two individuals, Pullinger and Sitler, as administrators d.b.n.c.t.a., who, upon petition of the estate, on May 21, 1956, were substituted for Alker in the Tax Court proceedings. Alker was convicted of tax fraud and his conviction was affirmed. *United States* v. *Alker*, 255 F. 2d 851 (C.A. 3), certiorari denied, 358 U.S. 817, rehearing denied, 359 U.S. 950. Following the conviction, the government amended its answer in the Tax Court proceedings to assert against the estate an addition to the tax of about $56,000, based on the same fraudulent acts involved in the criminal case. After protracted negotiations with the estate administrators, the government agreed to accept one-half of the amount of the claimed penalty, or $28,180.78, which was, by stipulation in the Tax Court proceedings, assessed as a deficiency. The deficiency was paid by the estate and other distributees who then, represented by the administrators, brought the instant proceeding in the Orphans' Court to collect the amount of the deficiency from Alker's share of the estate, represented by the award of the stock held in escrow.

In the meantime, on July 11 and 12, 1957, the government had levied on any property interests Alker had in the estate, to cover income taxes due from him on other transactions. (Pet. App. 6a.)

The Orphans' Court held (Pet. App. 6a–8a) that Alker's action was "the sole substantial cause of" the tax penalty, and that the amount thereof was therefore, under Pennsylvania law, properly apportioned

to his share in the estate, by application of the equitable doctrine of contribution underlying the Pennsylvania statutes on estate tax apportionment which were not directly applicable.[3] It rejected Alker's contention that he was not bound by the tax settlement because he was not a party to it; and also held that Alker's interest in the estate was subject to the apportionment of any tax liabilities and that therefore there was nothing due to Alker from the estate to which the federal tax lien for his income taxes could attach. (Pet. App. 9a–10a.) The Orphans' Court decision was affirmed *per curiam* by the Pennsylvania Supreme Court. (Pet. App. 1a.)

Alker makes two contentions here: (1) that he cannot, as a matter of due process of law, be held personally liable for the addition to the tax since, although he was given a hearing in the Orphans' Court on his liability under state law to those who paid the addition to the tax, he was not a party to the Tax Court proceedings in which the addition was assessed; and (2) that the additions for fraud provided by Section 3612(d)(2) of the Internal Revenue Code of 1939 are only applicable to excise taxes, and not to estate taxes.

While the government has not sought review of the portion of the decision below adverse to it, it is concerned about Alker's arguments since his first

[3] The Pennsylvania Estate Tax Apportionment Act of 1951, which did include penalties, was, however, only applicable to returns filed after August 24, 1951 (the return here was filed February 4, 1951), and the 1937 Act did not deal with apportionment of penalties. (Pet. App. 6a.)

point would result in making an executor who is personally liable for estate tax fraud, a necessary party to any proceedings to collect additions for fraud against the estate or other persons liable for the estate tax. On his theory, those who paid the tax could not secure any contribution from him either in equity or under estate tax apportionment statutes unless he had been a party to the federal tax collection proceedings. The second point would nullify the estate tax fraud penalty.

1. Joint and several liability for the estate tax is imposed by statute upon the estate itself, executors, administrators or other persons in control of the estate, and distributees of the estate. Internal Revenue Code of 1939, Sections 822(b), 826–827. (Internal Revenue Code of 1954, Sections 2002, 6324(a).) See Lowndes-Kramer, *Federal Estate and Gift Taxes* (2d ed.), Section 21.20. The government is entitled to collect the tax from any one of these parties alone, without joinder of the others (*Phillips* v. *Commissioner*, 283 U.S. 589), and Alker was therefore not a necessary party to the Tax Court case. The fact that Pennsylvania subsequently imposed a liability upon Alker as a result of the determination in the Tax Court proceeding neither made him a necessary party thereto nor made the proceeding any less valid an adjudication as between the United States and the estate. The United States takes no position on whether Pennsylvania denied Alker due process of law because of the effect which it gave in its probate proceeding to the determination in the Tax Court proceeding.

2. Alker's argument that Section 3612(d) of the 1939 Code is confined to excise tax returns ignores the fact that Section 3612(d) is a general provision relating to returns which is expressly made applicable to estate tax returns by Sections 821(e) and 894(a) of the 1939 Code.

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST, 1963.

U. S. GOVERNMENT PRINTING OFFICE: 1963

Office-Supreme Court, U.S.
FILED
SEP 9 1963
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1963.

No. 261.

ESTATE OF WINFRED S. HURST, Deceased:

HARRY J. ALKER, JR.,

Petitioner.

Sur Petition for Allowance of Writ of Certiorari to the Supreme Court of Pennsylvania and the Orphans' Court of Montgomery County, Pennsylvania.

PETITIONER'S REPLY BRIEF TO "BRIEF FOR RESPONDENTS IN OPPOSITION," AND "MEMORANDUM FOR THE UNITED STATES IN OPPOSITION."

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1963.

No. 261.

ESTATE OF WINFRED S. HURST, DECEASED:

HARRY J. ALKER, JR.,

Petitioner.

SUR PETITION FOR ALLOWANCE OF WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA AND THE ORPHANS' COURT OF MONTGOMERY COUNTY, PENNSYLVANIA.

PETITIONER'S REPLY BRIEF TO "BRIEF FOR RESPONDENTS IN OPPOSITION," AND "MEMORANDUM FOR THE UNITED STATES IN OPPOSITION."

ARGUMENT.

ESTATE TAX PENALTY IS INVALID.

As to Respondents' Brief.

Despite the respondents' attempt to justify their agreed Stipulation for "half a penalty" in the Courts below, and here, *petitioner reiterates* with all possible emphasis that there is no warrant in law for the imposition of the alleged "fraud penalty" on estate tax returns. Respondents, in footnote #2, at bottom of page 6, on their "Argument" in Brief in Opposition, say:

"2. Petitioner also asserts (Petition, pp. 8, 15-20), that the initial imposition of the civil penalty by Internal Revenue was unauthorized by statute, but this assertion is patently erroneous. Putting aside the question whether this issue is properly raised in this case, Section 894(a) of the 1939 Internal Revenue Code, pertaining to estate tax, which petitioner has not cited to this Court, provides:

> "' * * * False or Fraudulent Return.—For 50 per centum addition to the tax in case of a false or fraudulent return, see Section 3612(d)(2)'.

"Section 3612(d)(2) of the same code provides:

> '(d) Additions to Tax.—
>
> "'(2) Fraud.—In case a false or fraudulent return or list is willfully made, the Commissioner shall add to the tax 50 per centum of its amount * * *'."

Respondents' said quotation shows on its face that respondents *were, and still are, grossly in error* because the very language they cite as authority is ineffectual to impose; and does *not* impose, a "fraud penalty" of 50% of the tax or any other amount, for improper estate tax returns. The most that can be said for Section 894 of the 1939 Internal Revenue Code is that it makes a weak reference to Section 3612(d)(2) in that connection. Section 894, itself, imposes no penalty whatever for "fraud, or otherwise" on estate tax returns. And, as we have clearly shown in our original Brief herein, Section 3612(d)(2), by its very context and juxtapositions, *applies only to excise taxes* on goods, wares, and merchandise. The latter section makes no mention whatever of "fraud penalties" against estate tax returns.

Consequently, it is quite obvious to anyone, as it should have been to Respondents, that the attempted "incorporation by reference" of Section 894 was, and still is, wholly

abortive. Nothing is more certain in our Anglo-American law, both State and Federal, than the truisms that:

> "*Penalties* are never extended by implication. They *must be expressly imposed*, or *they cannot be enforced*."
>
> *Ellicott v. E. Penna. R. Co.*, 99 U. S. 573; 25 L. Ed. 292; and further that:

"A statute condemning goods for *fraud upon the revenue laws* is a *penal law*, and should be *strictly construed*." (Emphasis ours.)

> *U. S. v. 84 Boxes of Sugar*, 7 Peters 453; 8 L. Ed. 745.

Neither Section #894, nor Section #3612(d)(2), make any specific impositon of a "fraud penalty" on improper estate tax returns. And to be effective as a lawful penalty of any kind, such particularity is absolutely essential somewhere in the statute. There can *never be any valid penalty* for anything unless the statute specifically so asserts. (See *Cronin's Estate v. Comm.*, 164 F. 2d 566):

> "The provisions of statutes *levying taxes* will *not* be extended by implication beyond the *clear import* of the *language used*, nor their operations enlarged so as to embrace matters *not specifically pointed out*."
>
> *Gould v. Gould*, 245 U. S. 151, 62 L. Ed. 211;
> *Hecht v. Malley*, 265 U. S. 144, 68 L. Ed. 949.

This is, and always has been, the law in America. It is so axiomatic, so basic, and so long established that it is well-nigh impossible for the Respondents to have been unaware of it. Yet, their unwarranted and unlawful Stipulation for a "fraud penalty" in the U. S. Tax Court gives every evidence that they deliberately, or with *crass and culpable negligence*, agreed by Stipulation for imposition

of an *illegal* $28,000 "penalty" which, admittedly, they then intended to enforce by proration against this petitioner.

> "*No one can be punished* for a violation of a statute *unless* his case is *plainly and unmistakably within its terms.*" (Emphasis ours.)
>
> *U. S. v. Lacher*, 134 U. S. 624; 33 L. Ed. 1080;
> *U. S. v. Northern P. R. Co.*, 242 U. S. 190; 61 L. Ed. 240.

> "Statutes levying taxes are—construed most strongly against the government, and in favor of the citizen."
>
> *Gould v. Gould*, 245 U. S. 151; 62 L. Ed. 211;
> *Phila. v. Broomall*, 183 Pa. Super. 296 (1957); 130 A. 2d 713.

> "Whatever doubts exist in a tax measure must be resolved against the Government."
>
> *Schwan v. Doyle*, 258 U. S. 529; 66 L. Ed. 747;
> *U. S. v. Updike*, 281 U. S. 489; 74 L. Ed. 984;
> *Comm. v. Allied Bldg. Credits*, 385 Pa. 370 (1956), 123 A. 2d 686.

These salutary principles of law are embodied in the Uniform Statutory Construction Act adopted in Pennsylvania May 28, 1937, P. L. 1019 (46 P. S. 558), art. IV, Sec. 58:

> "*All provisions of a law* of the classes hereafter enumerated shall be strictly construed;
>
> (1) Penal provisions;
>
> . . . .
>
> (3) Provisions imposing taxes;—."

These stringent rules are not merely invoked by that comparatively modern statute; *Appeal of Schl. Dist. of Allentown*, 370 Pa. 161 (1952), 87 A. 2d 480; they are as ancient and as incontestable as the common law, itself: *Gallagher v. Neal*, 3 P. & W. 183; *Cake v. Jacoby*, 3 W. N. C.

391. Hence the respondents' disregard thereof by failing to assert such irrefutable defences in the U. S. Tax Court against the alleged "fraud penalty", so erroneously claimed therein, is so utterly inexcusable as to warrant a complete surcharge against them for the full amount of the $28,000 "half penalty" so recklessly paid by them.

What is the answer to this gross negligence by respondents? It is nothing more than repetitive character assassinations of the petitioner (Respondents' Brief, pp. 3 & 4)—a smear campaign, as is all *argumentum ad hominen*. And this, despite the fact that they know, or ought to know after all these years, that witness, Carpenter, an old employee of decedent, Winfred Hurst, exonerated this petitioner by testifying in Norristown, Pa., that said decedent, shortly before his death, stated that said $35,000 did not belong to him (decedent) but was the property of one Rothman, and that he, Carpenter, had personally delivered said $35,000 in cash, to said Rothman. Thus, petitioner's innocence of that false charge was completely established and the miscarriage of justice on his improper conviction was properly rectified.

Nonetheless, respondents continue to drag the same old "red herring" into this case in the hope that their crass incompetence and gross neglect may be overlooked, or excused by this Honorable Supreme Court. For similar reasons, they likewise inject the wholly irrelevant comments regarding petitioner's income tax difficulties which have nothing whatever to do with this case or any questions here involved. They also refer to his removal (p. 2), which our Brief (p. 5) properly explained. Why do they thus build up their Brief? The obvious reason can only be: "If you can't deny and refute the allegation, then you must defy and malign the alleger." Respondents doubtless feel that they simply had to do something to avoid the consequences of their incompetent mishandling of the claim in the United States Tax Court, their crass ignorance of available defenses there, and their utter neglect to assert the legal bars clearly precluding any penalty whatever in that

tribunal. And so, again and again, they continue here, as they have heretofore, to impugn the petitioner personally.

It should be abundantly clear, therefore, that the alleged "incorporation by reference" from Section #894 to Section #3612(d)(2), which is *a crucial Federal legal question of prime importance on a nation-wide scale*, does not in fact incorporate anything by reference. Section #894 I. R. Code, 1939, is nothing more than a footnote directing attention to an alleged "fraud penalty" in Section #3612(d)(2) dealing only with excise taxes on merchandise. Neither of these sections (so cited by respondents) imposes a fraud penalty for improper estate tax returns, *ipsissimis verbis* and with exactitude, as all penalty laws must do with particularity to be enforcible at all against anybody.

As to "Brief of United States in Opposition."

Lack of Due Process Admitted Both by Respondents and by United States.

The United States, through the Solicitor General, et al., has filed herein a Brief in Opposition. Like the Respondents, themselves, the United States has unwittingly *conceded the utter lack of Due Process* in this proceeding. On page 5 of their Brief, the United States says:

> "1. Joint and *several liability* for the estate tax *is imposed* by statute upon the estate itself, executors, administrators or other persons in control—*and distributees of the estate*. Internal Revenue Code of 1939, Sections 822(b), 826-827. (Internal Revenue Code of 1954, Sections 2002, 6324(a).) See Lowndes-Kramer, 'Federal Estate and Gift Taxes' (2nd Ed.), Section 21.20. The *Government is entitled to collect* the tax, *from any one of these persons alone*, without joinder of the others (Phillips v. Commissioner, 283 U. S. 589).
> * * * *"

The *petitioner*, Alker, although he withdrew as Executor in favor of respondents, as administrators d.b.n., c.t.a., *was still a one-eighth* residuary legatee and *distributee* under the Will. Thus, pursuant to the above-quoted admission by the United States, *petitioner was subjected to a possible legal liability by law* and, as such, *was continually liable to amercement* thereunder. Despite the constant threat of such penal liability, the United States says (p. 5):

> "—Alker was therefore not a necessary party to the Tax Court case."

And the Respondents erroneously conclude (page 24):

> "Alker,—neither had a right to participate as a party in the Tax Court, (see Rule 6 of the Rules of Practice of the Tax Court), nor a right to intervene. The Tax Court has no rules of intervention."

These gratuitous and self-serving errors by the Respondents and the United States are both glaring "non sequitur." The U. S. Tax Court is a c rt of record, and every court of record, whether common law, constitutional, or statutory in origin (unless specifically precluded by law), has the inherent right, under general principles of equity and justice, to permit intervention by any party liable to be affected by its judgment, and must accord notice and opportunity to be heard to any person whose property may be taken by its judgments or executions thereunder. These are requisites to the validity of any judicial determination by any tribunal anywhere in America. And their absence or denial is a violation of Due Process of Law under our U. S. Constitution. The mere neglect of specific rules to provide for such interventions is an immaterial oversight. The Respondents' failure fully to inform the U. S. Tax Court, and their purposive refusal to give this petitioner timely notice and an opportunity to be heard therein, even if the penalty were otherwise valid (which, as we have

shown, it is not), renders their stipulated penalty-judgment *void ab initio* as to petitioner, Alker, and vitiates Respondents' right to mulct the Petitioner in the courts below for any amount in any proceeding.

To prevent similar illegal injustices to many thousands of like-situated distributees throughout our Nation, Petitioner respectfully urges that it is well-nigh imperative for your honorable Supreme Court to grant Certiorari in this case.

It is further submitted that when the administrator d.b.n.c.t.a. replaced Alker, it acted as a release of any liability to the estate for any estate tax liability by Alker as executor.

The Stipulated Penalty Was Unlawful.

As Petitioner has shown in his original Brief (supporting petition) Section 3612(d)(2), by its very origin in 1864 (a half century before estate taxes were ever dreamed in the Congressional mind), by its context, and by the juxtapositions of its accompanying sections, has never been applicable to anything but *excise taxes on goods, wares, and merchandise.* None of its provisions was ever enlarged by any language whatever to include estate taxes and penalties. Moreover, *Section 894(a)* of the I. R. Code, 1939, contrary to Respondents' unsupported, unverified, and dogmatic "ipsedixitisms" *is not*, even by the widest stretch of their own imaginations, a competent *incorporation by reference.* The United States, in its Brief (page 6) has added to this confusion by similarly citing Sections #821(e) and #894(a) of the 1939 I. R. Code. But even a superficial examination of Section #821(e) conclusively shows that it, too, is *merely another bald reference* to Section 3612, wholly *devoid of any incorporation* therein and without any words whatever therein added to impose any penalties of any kind in any amount upon anyone. Penalty-muleting by imagination is alien to our Anglo-American law. Such impositions against our citizens can be enacted

only by Congressional words that are clear, precise, and indubitable in regard to the persons, places, things, acts or omissions requisite for the specific amercements intended. Guesswork is as foreign to our fundamental concepts as is the "presumption of guilt" in alien juridical systems.

The only penalty that might ever have been validly entered against this *Hurst Estate*, or against any of its residuary legatees, as distributees thereof, is that encompassed by Section #871(i) of the U. S. I. R. Code, namely: a fraud penalty of *fifty per centum (50%) of the deficiency*—not 50% of the total tax, or any part thereof. This was noted and fully covered in Petitioner's original petition, citing the case of *Estate of Harry Stoll Leyman, deceased v. Commissioner*, 40 T. C. — No. 15 — 4/24/63. But, in this *Hurst Estate* in the U. S. Tax Court there was, and is, a specific finding of fact that "no deficiency in the Estate tax exists or is due." It follows, therefore, that no valid penalty of any kind in any amount could properly be found due, adjudged or entered against *Hurst's Estate*, its executor, administrators, or distributees. Hence the $28,180.78 "half-penalty" so stipulated by Respondents, was *null and void* as a "*functus officio*", and the proration judgment of the courts below, resting entirely thereon, is likewise vitiated by the same illegality. See *Cronin's Estate v. Commissioner*, 164 F. 2d 566 (13 and 14).

Furthermore, the record irrefutably shows that Certificate No. 24 of the Dublin Hosiery Company's stock was delivered to the Petitioner, Alker, and by him, in turn, entrusted to three (3) persons appointed by Petitioner in writing to act as his escrow agents. Thus, they were merely "stakeholders" of said stock as Alker's representatives, and the maxim "qui facit per alium, facit per se" applies so that ownership remained always in the Petitioner, Alker. It is fundamental law that an agent can never contest, deny or impugn his principal's title to the subject-matter of his agency.

The legal questions thereby raised in this case, despite respondents' pleas to minimize them, are of vital national importance.

Unless this honorable Supreme Court grant certiorari here to review the erroneous decisions below, the United States Internal Revenue Service will continue its unlawful practice of trying to collect "fraud penalties" of 50% of the tax in many hundreds of estate tax returns throughout America whenever these tax-gathers can superficially allege an improper return. And to justify such form of "extortion", they will gleefully cite this case.

For these, and all other reasons previously argued, petitioner courteously urges that Writ of Certiorari should be granted not only to achieve equity for this applicant but also to prevent the wholesale mulcting of other Federal taxpayers by the collection of illegal "fraud penalties."

Respectfully submitted,

JAMES J. REGAN, JR.,
ROBERT M. TAYLOR,
Attorneys for Petitioner.

Office-Supreme Court, U.S.
FILED
NOV 8 1963
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1963.

No. 261.

ESTATE OF WINFRED S. HURST, DECEASED.

HARRY J. ALKER, JR.,
Petitioner.

PETITION FOR RE-HEARING OF PETITION FOR ALLOWANCE OF WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA AND THE ORPHANS' COURT OF MONTGOMERY COUNTY, PENNSYLVANIA.

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To the Honorable the Chief Justice and Associate Justices of the United States Supreme Court:

The petition of Harry J. Alker, Jr., respectfully represents that

1. On July 8, 1963, he filed in this Honorable Supreme Court a petition for allowance of writ of certiorari to both the Supreme Court of Pennsylvania and the Orphans' Court of Montgomery County, Pennsylvania, seeking review of a "Federal Estate Tax proration judgment of $28,180.78

against said Alker's residuary interest in the Estate of Winfred S. Hurst, deceased."

2. Thereafter, a Brief for Respondents in Opposition, and also a Memorandum for the United States in Opposition were duly filed herein by the United States Solicitor General and the United States Attorney General.

3. Petitioner then filed a "Reply Brief" to both of those in opposition.

4. On October 14, 1963, this Honorable Supreme Court denied the petition for Writ of Certiorari.

5. Petitioner believes and therefore avers that, because of the welter of controversies ensuing from the accumulation of an enormously large number of cases filed with this Court during the 1963 Summer recess, your Honorable Supreme Court has inadvertently overlooked both the nationwide importance and the uniqueness of the questions of Federal Law presented by petitioner's original application for Certiorari herein.

(a) These qualities of national importance and uniqueness have always been, and still are, cited in the Rules of this Honorable Supreme Court as one of the prime reasons, and doubtless the most cogent motivation, for the granting of a review by Certiorari from this Court, viz.:

> "Where a state court has decided a federal question of substance not theretofore determined by this Court, or has decided it in a way probably not in accord with applicable decisions of this Court."

(b) Both premises suggested by this Court's own rule, above-quoted, are present in this case, viz.: the Supreme Court of Pennsylvania, per curiam without any reasoned opinion, and the lower Orphans' Court of Montgomery

County therein by a speciously contrived and untenable opinion, have decided a Federal question of substance regarding taxes and penalties under the United States Internal Revenue Code which has never heretofore been determined by your Honorable Supreme Court, and moreover, both said State Courts have decided the said substantial Federal question in such a way as to be wholly incompatible with the apposite reasoning that your Honorable Supreme Court inevitably and unquestionably would apply thereto.

6. The uniqueness of said substantial Federal question is proved beyond rebuttal by the words of Judge Scott, for a unanimous United States Tax Court (*Leyman Estate v. C. I. R.*, Docket #77075, filed 4-24-1963, 40 T. C. — No. 15; CCH Dec. 26,081, pp. 2369-91), at page 2389, where it is said:

> "Neither party has called our attention to a reported case involving a false or fraudulent estate tax return, *nor have we found any such reported case.*"

7. Hence petitioner respectfully suggests that it is well-nigh imperative that all United States judges, the bench and bar in all the States, and the many thousands of tax-paying fiduciaries, who might otherwise be victimized by the utter lack of such a beacon, are entitled to the ultimate guidance inevitably ensuing from a definitive, reasoned opinion of this Honorable Supreme Court to be reported on this grave Federal question, properly raised but improperly decided in the Courts below.

8. The grave error of the learned State Courts below upon the said substantial Federal question, here involved, is conclusively shown by the diametric opposition of their rulings to the decision of the United States Tax Court, on April 24, 1963, in *Leyman Estate v. C. I. R., supra* (par. #6), wherein, on page 2390 thereof, the latter Court said

> "We believe that a 'sensible construction, such as will effectuate the legislative intention' of the provisions

of Section 871(i), 894(a), and 3612(d) of the Internal Revenue Code of 1939 is that the 50 per centum addition is *to the difference between the correct tax liability and the tax shown on the return, or deficiency, and so hold.*" (Emphasis ours.)

(a) This is precisely the position and the ruling that petitioner previously urged in his original petition and briefs filed with your Honorable Supreme Court in this case now at bar, and it is likewise contrary not only to the views of the respondents, and of the United States, through its Attorney General and its Solicitor General, but also to the erroneous decisions of the learned Courts below. Such an irreconcilable variance between the State Courts and the only United States Court to have thus far passed upon such a substantial Federal question is but another more cogent reason for the allowance of Writ of Certiorari in this case.

9. It is a matter of record, and both sides (including the United States) admit that in the tax proceeding of *Hurst Estate v. C. I. R.*, it was stipulated by the parties and the *Tax Court found as a fact* that there was "*no deficiency of estate tax due*" to said Commissioner. Consequently under the United States Tax Court's ruling in the *Leyman Estate* case, *supra*, there could never be, or have been, any "estate tax penalty" for alleged "fraud" either legally due or lawfully collectible from this Winfred Hurst Estate in any amount at any time. Thus, the stipulation agreeing to imposition of said penalty of $28,180.78, and the subsequent proration judgment against petitioner in that amount, based thereon, in said Pennsylvania State Courts were both invalid and void *ab initio*. Such nullity, therefore, vitiates the judgments below as *functus officio*, especially when founded on an action in which this *petitioner had no notice and no opportunity to be heard*, and renders them "*a taking of petitioner's property without due process of law,*" in crass violation of both the 5th and

the 14th Amendments, U. S. Constitution—an added compelling reason for your Honorable Court's issuance of a Writ of Certiorari herein.

Wherefore, petitioner prays for a re-hearing of his said Petition for Allowance of Writ of Certiorari, as originally sought herein, and respectfully requests the allowance thereof forthwith.

JAMES J. REGAN, JR.,
ROBERT M. TAYLOR,
Attorneys for Petitioner.

It is hereby certified that the preceding Petition for Re-hearing is presented in good faith and not for delay, and is restricted to the grounds above specified.

JAMES J. REGAN, JR.,
ROBERT M. TAYLOR,
Attorneys for Petitioner.